

1 **IN THE UNITED STATES DISTRICT COURT**
2 **FOR THE DISTRICT OF PUERTO RICO**

3 **MAYRA GUZMAN-FONALLEDAS, et al.,**

4 **Plaintiffs,**

5 **v.**

6 **HOSPITAL ESPAÑOL AUXILIO MUTUO, et al.,**

7 **Defendants.**

CASE NO. 16-1602 (GAG)

8
9 **OPINION AND ORDER**

10 Plaintiffs Mayra Guzmán-Fonalledas and Roberto Resto-Martínez sued Defendants
11 Hospital Español Auxilio Mutuo de Puerto Rico, Inc., et al., for negligence under Puerto Rico
12 law.¹ (Docket No 28). They allege that Defendants breached the standard of care by misreading a
13 pathology report and forcing Guzmán-Fonalledas to undergo an unnecessary medical procedure
14 with negative consequences over her wellbeing. Plaintiffs have proffered three expert witnesses
15 and Defendants move to limit the scope of two experts' testimony and disqualify the third. (Docket
16 Nos. 130-32).

17 **I. Relevant Factual and Procedural Background**

18 Plaintiff Mayra Guzmán-Fonalledas, a member of the Auxilio Mutuo Medical Plan,
19 complained of reflux to Dr. Salmone-Velilla during a routine visit in early 2015. (Docket No. 28
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21 ¹ The other Defendants are: Rafael J. Pastrana-Laborde, Integrated Pathology, PSC; Nella Fernández; Víctor
22 Carlo-Vargas; Puerto Rico Medical Defense Insurance Company; Jorge I. Pelet-Mejías; Continental Casualty
23 Company as the insurer for Dr. Rafael Pastrana-Laborde; RenaissanceRe Syndicate Limited as the Insurer for
24 Hospital Auxilio Mutuo; Sindicato de Aseguradores de Impericia Médica; Dorián López-Bracety; Lourdes Del
Toro; Yanira Pagán; Conjugal Partnership Pastrana-Lopez; Conjugal Partnership Doe-Fernandez; Conjugal
Partnership Carlo-Pagan; Conjugal Partnership Pelet-Del Toro; and an alphabet of space-holding John Does and
ABC insurance corporations.

¶ 3.1-3.2). Subsequently, Dr. Pastrana-Laborde, a gastroenterologist, performed an endoscopy, in which he extracted tissue from a gastric polyp. Id. ¶ 3.3). The tissue was sent to Integrated Psychology Services (“IPS”), where Dr. Nella Fernández diagnosed an adenocarcinoma, a type of cancer. Id. ¶ 3.4. Her colleague, Dr. Víctor Carlo-Vargas, concurred with the diagnosis. Id. As a result, Dr. Pastrana-Laborde informed Guzmán-Fonalledas of her cancer diagnosis and ordered additional studies. Id. ¶ 3.5. In a follow-up appointment, Dr. Pastrana-Laborde ordered Guzmán-Fonalledas to undergo a gastrectomy, and referred her to Dr. Pelet-Mejías for surgery. Id. ¶ 3.8.

Dr. Pelet-Mejías conducted a total gastrectomy, and sent tissue from the surgery to IPS, which revealed that Guzmán-Fonalledas actually did not have gastric cancer but rather a “neuroendocrine neoplasm low grade 1.1 cm in size,” a benign or low grade lesion. Id. ¶ 3.9. Two weeks after the pathology report was issued, Guzmán-Fonalledas attended a follow-up appointment with Dr. Salmone-Velilla of the Auxilio Mutuo External Clinics, who did not inform her of the pathology report, and referred her to Dr. Lozada-Costas, an oncologist in the hospital. Id. ¶ 3.10.

But at the behest of a friend, Guzmán-Fonalledas contacted another oncologist, Dr. Báez-Díaz, who suspected that she was misdiagnosed and subjected to an unnecessary surgical proceeding. Id. ¶ 3.11. Dr. Báez-Díaz called Dr. Pelet-Mejías, the surgeon, who allegedly acknowledged that the two pathological reports were incompatible and “concealed from Ms. Guzmán that the tissue he had actually removed the day of the surgery, had not been diagnosed as an adenocarcinoma.” Id. ¶ 3.12. Dr. Báez-Díaz also asked Dr. Carlo-Vargas to review the polyp tissue from the endoscopy, which he did, and consequently acknowledged that the original diagnosis was incorrect. Id. ¶ 3.14.

1 A month after the pathologist, Dr. Carlo-Vargas, confirmed the misdiagnosis, Guzmán-
2 Fonalledas attended a follow-up appointment with the Auxilio Mutuo's oncologist, Dr. Lozada-
3 Costas. Id. ¶ 3.16. He told her she did not need cancer therapy but omitted that she did not have an
4 adenocarcinoma and that the surgery was unnecessary. Id. On the same day, in a similar follow-
5 up visit, Dr. Pastrana-Laborde, the gastroenterologist, made the same assertions and omissions as
6 Dr. Lozada-Costas. Id. ¶ 3.17.

7 Plaintiffs allege that the unnecessary surgical procedure "has been devastating." Id. ¶ 3.19.
8 "If the correct diagnosis had been made in the First Biopsy, then a local resection would have been
9 more than adequate to cure Ms. Guzmán Fonalledas." Id. ¶ 3.18. But instead, as a result, Guzmán-
10 Fonalledas suffers difficulty tolerating food and has lost more than eighty pounds; at the time of
11 her complaint, she weighed eighty-seven pounds. Id. ¶ 3.19. Upon medical advice, she sought
12 treatment at the Moffit Cancer Center in Tampa, Florida. Id. ¶ 3.20. And as of filing her complaint,
13 she was fed through a gastro-intestinal tube through her nose, and "her condition is extremely
14 serious and life threatening." Id. ¶ 3.21.

15 Plaintiffs announced three expert witnesses for trial. First is Gerri Pennachio, who "will
16 testify regarding his review of the pertinent medical records and Mayra Guzmán-Fonalledas'[s]
17 condition and the expected life care expenses." (Docket No. 125 at 87). She has an MA in
18 Vocational Rehabilitation Counseling and a BS in Therapeutic Recreation. (Docket No. 131-2).
19 For almost forty years she has worked as a Certified Rehabilitation Counselor, Certified Life Care
20 Planner, and Certified Vocational Evaluator at Counseling and Rehabilitation Associates in
21 Lakeland, Florida. Id. Her duties include "Medical case management," "Vocational/personal
22 counseling and guidance for disabled individuals," and "Personal Injury Litigation Testimony."
23 Id.

1 The second expert is Dr. Daniel Steven Timmerman, who “will testify regarding his review
2 of the pertinent medical records and Defendants’ medical malpractice and negligence, as set forth
3 in the Second Amended Complaint and in his expert report.” (Docket No. 125 at 87). He is a board-
4 certified surgeon with years of experience, and has performed hundreds or thousands of
5 adenocarcinoma surgeries, including between forty and fifty stomach cancer surgeries. (Docket
6 Nos. 130-2; 136 at 11-12).

7 The third expert is Dr. William L. Manion, who “will testify regarding his review of the
8 pertinent medical records and Defendants’ medical malpractice and negligence, as set forth in the
9 Second Amended Complaint and in his expert report.” (Docket No. 125 at 87). He holds an MD,
10 PhD, JD, and an MBA, and is the President and CEO of Diagnostic Pathology Consultants, the
11 Designated Forensic Pathologist in Burlington and Ocean Counties, and the Chairman of the
12 Pathology Department in Memorial Hospital of Salem County, among other things. (Docket No.
13 132-2). Upon reviewing eight records, including Guzmán-Fonalledas’s medical records, various
14 depositions, and Dr. Timmerman’s expert report, he concluded that:

15 [I]t would be my opinion to a reasonable degree of medical and surgical pathology
16 certainty that the failure to diagnosis the low grade neuroendocrine adenocarcinoma
17 and mistakenly identify it as a gastric adenocarcinoma constitutes a significant
18 deviation from the usual standards of medical care. As a result of the diagnosis of
19 adenocarcinoma the patient underwent a much more aggressive surgery that included
20 the entire removal of her stomach. This is reasonable as gastric adenocarcinomas can
21 infiltrate through the submucosa and spread in a *linitis plastica* pattern. As a result of
22 the gastrectomy with *esophagojejunal anastomosis* the patient now has very serious
23 medical problems and has lost sixty pounds. If the correct diagnosis had been made of
24 low grade neuroendocrine neoplasm then a local resection of the tumor would have
been more than adequate to cure Mayra Guzman of the tumor. This would have
allowed her to maintain her stomach so that she could maintain her normal nutritional
status. Instead a complete gastrectomy was performed with an *esophagojejunal*
anastomosis that has now left the patient with severe symptoms and life threatening
weight loss. I hold all opinions to a reasonable degree of medial and forensic certainty.
(Docket 132-3 at 2-3).

1 In response to Plaintiffs' expert witnesses, Defendants filed motions in limine to limit the
2 scope of Pennachio and Dr. Timmerman's testimony, and to disqualify Dr. Manion altogether as
3 unqualified and unreliable. See Docket Nos. 130-32.

4 **II. Discussion**

5 Defendants challenge Pennachio, Dr. Timmerman and Dr. Manion's qualifications as
6 experts and move to limit the scope of their testimony to their areas of expertise. They also move
7 to exclude Dr. Manion's testimony because they contend he is only qualified to testify as a
8 pathologist and his opinion lacks a reliable basis.

9 To admit expert testimony, the Court must first qualify the witness as an expert. Ed Peters
10 Jewelry Co., Inc. v. C & J Jewelry Co., Inc., 124 F.3d 252 (1st Cir. 1997) ("The trial court first
11 must determine whether the putative expert is 'qualified'" (citing Bogosian v. Mercedes-
12 Benz of N.A., Inc., 104 F.3d 472, 476 (1st Cir. 1997)). For this, it must consider "whether the
13 putative expert is qualified by knowledge, skill, experience, training, or education," to offer
14 testimony. Pagés-Ramírez v. Ramírez Gonzáez, 605 F.3d 109, 113 (1st Cir. 2010) (citing Mitchell
15 v. United States, 141 F.3d 8, 14 (1st Cir. 1998)). And as the First Circuit has explained, "[t]he
16 proffered expert physician need not be a specialist in a particular medical discipline to render
17 expert testimony relating to that discipline." Gaydar v. Sociedad Instituto Gineco-Quirurgico y
18 Planificacion Familiar, 345 F.3d 15, 24 (1st Cir. 2003).

19 Once a witness has been qualified as an expert, Federal Rule of Evidence 702 governs the
20 admission of expert testimony. Rule 702 requires that expert testimony (1) be "based on sufficient
21 facts or data;" (2) be "the product of reliable principles and methods;" and (3) that the witness
22 apply "the principles and methods reliably" to the particular facts of the case. FED R. EVID. 702.
23 This Rule is read alongside the liberal relevance requirement of Rule 401. Id. 401; Daubert v.
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1 Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 587 (1993) (“[T]he Rule’s basic standard of
2 relevance thus is a liberal one.”). Hence in Daubert, the Supreme Court interpreted Rule 702 as
3 requiring the judge to determine “whether the expert is proposing to testify to (1) scientific
4 knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.” Daubert,
5 509 U.S. at 592-93. Simplified, the Court must determine the evidence’s relevance and reliability.
6 See Pagés-Ramírez, 605 F.3d at 113 (citing United States v. Mooney, 315 F.3d 54, 62 (1st Cir.
7 2002) (“The judge must ensure that an expert’s testimony ‘both rests on a reliable foundation and
8 is relevant to the task at hand.’”)). And in its determination, the trial court serves a gatekeeping
9 function to ensure the witness’s “specialized knowledge will help the trier of fact understand the
10 evidence or determine a fact in issue[.]” Pagés-Ramírez, 605 F.3d at 113 (citing Gaydar, 345 F.3d
11 at 24).

12 In Daubert, the Supreme Court listed four factors to determine an expert’s testimony’s
13 reliability, but “d[id] not presume to set out a definitive checklist or test.” Daubert, 509 U.S. at
14 593. The First Circuit has held that the proponent of expert testimony does not need to prove that
15 the expert is correct, but “must show only that the expert’s conclusion has been arrived at in a
16 scientifically sound and methodologically reliable fashion.” Milward v. Acuity Specialty Prod.
17 Grp., Inc., 639 F.3d 11, 15 (1st Cir. 2011). Most pertinent here, in the case of a medical expert, the
18 First Circuit has held that the expert’s knowledge “rests on a reliable foundation” just based on the
19 expert’s “medical education and many years of experience in the field.” Pagés-Ramírez, 605 F.3d
20 at 116. The rationale for this permissive standard is simple and based on the adversarial process:
21 “So long as an expert’s scientific testimony rests upon “‘good grounds,’ based on what is known,’
22 it should be tested by the adversarial process, rather than excluded for fear that jurors will not be
23 able to handle the scientific complexities.” Id. (citing Daubert, 509 U.S. at 590, 596) (internal
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1 citations omitted). The right approach, the Supreme Court explained in Daubert, is to use
2 “[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the
3 burden of proof” to attack “shaky but admissible evidence.” Daubert, 509 U.S. at 596.

4 Here, all three expert witnesses are qualified for their proposed use.

5 *1. Pennachio*

6 Pennachio “will testify regarding [her] review of the pertinent medical records and Mayra
7 Guzmán-Fonalledas’[s] condition and the expected life care expenses.” (Docket No. 125 at 87).
8 Defendants concede that she has expertise “in the area of life care planning,” but argue that she is
9 not qualified to testify about any other topic. (Docket No. 131 at 6). Although she is not a medic,
10 she carries forty years of experience managing medical cases and providing counseling and
11 guidance for disabled individuals. She also received a BS in therapeutic recreation and an MA in
12 vocational rehabilitation counseling, and thus her curriculum vitae qualifies her to testify about
13 Guzmán-Fonalledas’s condition in the context of her medical records and expected life care
14 expenses. Should Pennachio exceed the bounds of her intellectual authority, Defendants will be
15 able to highlight such excesses in cross-examination, and the jury will afford the pertinent weight
16 to her testimony.

17 *2. Dr. Timmerman*

18 Dr. Timmerman is also qualified to testify regarding his review of pertinent medical
19 records and Defendants’ medical malpractice and negligence. Defendants wish to limit Dr.
20 Timmerman’s testimony to his expertise as a surgeon, and exclude his testimony as to pathology.
21 But the First Circuit made clear in Gaydar, “[t]he proffered expert physician need not be a
22 specialist in a particular medical discipline to render expert testimony relating to that discipline.”
23 345 F.3d at 24 (holding that “the mere fact that [an expert] was not a gynecologist does not mean
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1 that he was not qualified to give expert testimony regarding [the Plaintiff's] pregnancy"). As a
2 board-certified surgeon with years of experience and dozens of stomach cancer surgeries under his
3 belt, Dr. Timmerman could very well testify about Defendants' medical malpractice, e.g., on how
4 to detect said cancers or conduct the appropriate surgeries for different kinds of tumors. Thus, as
5 Plaintiffs argue, Dr. Timmerman's opinion could assist the Court in its determination of negligence
6 in every issue inside the scope of medical practice. See Docket No. 136 at 4.

7 *3. Dr. Manion*

8 The same reasoning applied for Dr. Timmerman's qualifications applies to Dr. Manion. As
9 a doctor and pathologist, he can also testify regarding his review of pertinent medical records and
10 Defendants' medical malpractice and negligence. Granted, Dr. Manion stated in his deposition that
11 his testimony would be limited to the pathology aspect of the case. (Docket No. 132-1 at 10). If he
12 digresses into other areas, Defendants may try to impeach his credibility on cross-examination.
13 But this alone does not disqualify him as an expert on medical topics.

14 Defendants also contest Dr. Manion's reliability because he did not examine the pathology
15 slides of the original diagnosis and "his deposition testimony established that the stated
16 conclusions are not the result of the analysis of any evidence but rather the adoption of conclusions
17 from third parties and then well outside the scope of his area of expertise." (Docket No. 132 at 2).
18 But the fact that he concluded that Defendants deviated from the usual standards of medical care
19 without looking at the pathological slides also raises an issue for cross-examination. It does not
20 disqualify him as an expert witness and does not prove his opinion lacked a reliable foundation, as
21 Defendants argue. His mere status as a doctor with three decades of experience, per First Circuit
22 precedent, establishes a reliable foundation. See Pagés-Ramirez, 605 F.3d at 116 (finding that the
23 expert's knowledge "rests on a reliable foundation" based on the expert's "medical education and
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1 many years of experience in the field”). Moreover, his opinion is reliable because it is based on
2 his review of four depositions, three medical records, two letters, and Dr. Timmerman’s report.
3 (Docket Nos. 132-3; 132-4). A review of these exhibits further reveals that he is not merely
4 adopting others’ conclusions, as Defendants argue. Instead, he is analyzing the record and others’
5 conclusions in chronological order to determine that, if what these records say (or fail to say) is
6 true, Defendants acted negligently.

7 **III. Conclusion**

8 For the reasons above, Defendants’ motions in limine at Docket Nos. 130-32 are **DENIED**.

9 **SO ORDERED.**

10 In San Juan, Puerto Rico this 23rd day of April, 2018.

11 *s/ Gustavo A. Gelpí*
12 GUSTAVO A. GELPI
13 United States District Judge
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